A Subramaniam a/l Arunaselam v Goh Kim Seam

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–25–184 OF 1998
KAMALANATHAN RATNAM J
7 APRIL 1999

Civil Procedure *— Want of prosecution — Delay — Application to strike off writ — Case set down for trial — Defendant guilty of delay in allowing for allowing case to remain in court registry for eight years — Whether application should be allowed*

The plaintiff filed a writ against the defendant in November 1988. In November 1994, the plaintiff set the case down for trial. Since then, both parties went into deep slumber. Ten years after the writ was filed, the defendant filed an application to strike off the writ for want of prosecution. The defendant raised the issue of delay and the resultant prejudice to the defendant. The plaintiff raised a preliminary objection that the defendant's application did not comply with Form 62 applicable to O 32 r 1 of the Rules of the High Court 1980 ('the RHC') in that the grounds of the application were not stated in the application itself.

Held, dismissing the defendant's application:

(1) Order 41 r 5(1) and (2) of the RHC allows a party to use affidavit evidence in support of any interlocutory proceedings. The defendant had in the application stated at the bottom that the grounds in support of the application were as stated in the affidavit in support of the application. Therefore, the preliminary objection was dismissed (see p 661 D–E).

(2) The defendant himself was guilty of delay in allowing for this case to remain in the court registry for eight years. The conduct of the defendant in filing this application after all these years of slumber seemed like the proverbial pointing of a finger of guilt at the plaintiff when four other fingers are pointing at the defendant (see p 661F–G).

[Bahasa Malaysia summary

Plaintif telah memfailkan writ terhadap defendan pada November 1988. Pada November 1994, plaintif telah menetapkan kes untuk perbicaraan. Selepas itu, kedua-dua pihak tidak melakukan apa-apa. Sepuluh tahun selepas writ tersebut difailkan, defendan telah memfailkan permohonan untuk mengketepikan writ tersebut kerana ketiadaan pendakwaan. Defendan telah membangkitkan isu mengenai kelengahan dan juga prejudis yang diakibatkan kepada defendan. Plaintif telah membangkitkan bantahan awal bahawa permohonan defendan tidak mematuhi Borang 62 yang terpakai kepada A 32 k 1 Kaedah-Kaedah Mahkamah Tinggi ('KMT tersebut') kerana

A alasan-alasan permohonan tidak dinyatakan di dalam permohonan itu sendiri.

Diputuskan, menolak permohonan defendan:

(1) Aturan 41 k 5(1) dan (2) KMT membenarkan suatu pihak untuk
B menggunakan keterangan afidavit di dalam menyokong suatu prosiding interlokutori. Defendan telah di dalam permohonannya menyatakan di bahagian akhir bahawa alasan-alasan untuk menyokong permohonan tersebut adalah dinyatakan di dalam afidavit yang menyokong permohonan tersebut. Oleh itu, bantahan awal ditolak (lihat ms 661D–E).

C (2) Defendan sendiri adalah bersalah kerana kelengahan dalam membenarkan kes ini kekal di pejabat pendaftaran mahkamah selama lapan tahun. Kelakuan defendan di dalam memfailkan permohonan ini selepas selepas ketiadaan dakwaan selama bertahun-tahun adalah seolah-olah pepatah menuding jari ke arah
D plaintif sementara empat jari yang lain menuding ke arah defendan (lihat ms 661F–G)].

Notes

For cases on want of prosecution due to delay, see 2(2) *Mallal's Digest*
E (4th Ed, 1998 Reissue) paras 4974–4978.

Nor Amimi bte Sepit (*Othman Hashim & Co*) for the appellant/defendant.
Suhardi bin Suhai (*VP Nahan & Partners*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

F *Facts*

The plaintiff is the administrator of the estate of one Vijaya Endreen a/l Muniandy. The deceased died as a result of a fatal accident on 14 November 1982 whilst riding a motorcycle. The defendant was the owner and rider of another motorcycle that collided into the deceased
G and/or his motorcycle. The statement of claim disclosed that whilst the deceased was proceeding on his correct side of the road the deceased was collided into by the defendant who suddenly crossed and encroached into the decreased's path. Many allegations of negligence were pleaded.

H *The claim*

The claim was for dependency and under the old s 8(2)(c) of the Civil Law Act 1956 which allowed for an estate claim for 'lost years' which, since the amendment to the Civil Law Act in 1984, had been abolished.

I *The defence*

Save for admitting that the said two vehicles were involved in the collision, the defendant denied all other allegations. Amongst other particulars of the

decreased's negligence, the defendant averred that the deceased had encroached into the defendant's path, thus causing the collision. A

Chronology of events

The writ was filed on 15 November 1988, just one day short of the 6-year limitation period which allows for the claim for the lost years, although it was dated 14 November 1988. An affidavit of service by an adjuster showed that the writ was served on the defendant on 4 May 1989. An appearance was entered on 29 July 1989 on behalf of the defendant, by the firm of Othman Hashim Chew & Co. The defendant's solicitors then took out a summons (encl 4) to strike out the writ on the basis that: B C

(1) the statement of claim had not been filed within 14 days from date of entry of appearance; and

(2) a fatal claim ought to have been filed within 3 years of the death, that is/ by 13 November 1985 and that therefore since this writ was filed on 14 November 1988 it was out of time. D

The said application was fixed for hearing on 26 October 1990. Subsequently, both parties attended court and adjourned hearing of this simple application from 25 October 1990 to 20 November 1990 to 12 December 1990 to 3 January 1991. On 3 January 1991 counsel for the defendant asked for an adjournment to take instructions and to reply to an affidavit. In the meantime whilst much water was flowing under the bridge, the plaintiff quietly filed his statement of claim on 1 December 1990. The conduct of the defendant baffles logic. His counsel then filed the defence on 26 December 1990 and pleaded limitation. E

In the meantime on 17 January 1991, counsel for the defendant withdrew encl 4 with no order as to costs and filed encl 8. This application was almost similar to encl 4 except this time it specifically called for the striking off of the writ and statement of claim due to limitation and the affidavit in support was a regurgitation of the earlier reasons. F

However, again, counsel for the defendant withdrew his application, encl 8 on 4 February 1991. G

The defendant's solicitors launched application encl 11, again to strike out the writ, this time for want of prosecution. Enclosure 11 then came up for hearing on 18 March 1991. Again counsel for both parties requested an adjournment pending settlement. On 3 April 1991 when this case came up for hearing counsel for the plaintiff reported sick and the matter was then adjourned to 30 April 1991. On this date defence counsel mentioned for the plaintiff who requested another date to file an affidavit in reply to encl 11. H

I am relating the entire history of this case to show the appalling conduct of both counsel to a simple running down matter. It must be noted that both parties at this stage were still applying to strike out the writ even though the defendant had filed his defence. I

Enclosure 11 was again fixed for hearing on 29 May 1991. Counsel for the defendant again attended court, mentioned for the plaintiff's silicitors

A and took another date, because counsel for the plaintiff had not as yet filed his affidavit in reply. Finally encl 11 was put to rest on 2 July 1991 by the Senior Assistant Registrar (SAR) who .dismissed it on the ground that the application by the defendant was filed pursuant to a wrong rule of the High Court.

B The plaintiff then on 11 November 1994 set the case down for trial and since this eventful date both solicitors went into deep slumber.

The application to strike out (encl 20)

Sixteen years after the death of Vijaya Endreen and ten years after the writ C was filed, counsel for the defendant finally shook off his winter coat, emerged from hibernation and fired his fourth salvo in the form of encl 20, which was again a repeat performance of the earlier three failed attempts at striking off the writ and statement of claim for want of prosecution, as he did on his third attempt. The affidavit in support raised the issue of delay and the resultant prejudice to the defendant.

D I then heard encl 20 on 16 October 1998. The plaintiff raised a preliminary objection that encl 20 did not comply with Form 62 applicable to O 32 r 1 of the Rules of the High Court 1980 ('the RHC') in that the grounds of the application were not stated in the application itself as shown in Form 62. I dismissed the preliminary objection on the basis that O 41 E r 5(1) and (2) of the RHC allows a party to use affidavit evidence in support of any interlocutory proceedings and that the plaintiff had in the application stated at the bottom that the grounds in support of the application are as stated in the affidavit in support (encl 19) of the said application.

Having read the affidavit relating to encl 20 and since the matter was rather straight forward I dismissed the defendant's application but awarded F the defendant costs of RM150.

I dismissed the application because the defendant himself was guilty of delay in allowing for this case to remain in the court registry for 8 years. The conduct of the defendant in filing this application after all these years cf slumber seems to me like the proverbial pointing of a finger of guilt at the G plaintiff when four other fingers are pointing at the defendant.

Besides, since I intended to give an early date for the full hearing of the case I did not see the urgency of acceding to the defendant's belated plea. I was also intending to see if the plaintiff himself after all these years of delay would be able to produce any eye-witness to the accident. I then fixed the hearing of the case to 25 February 1999 in open court.

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On that date, neither the plaintiff nor his witness appeared. Counsel for the plaintiff then left it to the court. Counsel for the defendant then prayed for the case to be dismissed and left the issue of costs to the court to decide. I then dismissed the suit with no order as to costs.

I am at a loss as to the reason the defendant persists with this appeal. I The whole case is over and yet encl 20 is still in issue. Since the conduct of the defendant and his counsel smacks of exceptional delay the persistence

of the defendant in pursuing this appeal to justify his application to strike out (encl 20) is nothing more than waste of precious judicial time. A

Defendant's application dismissed.

Reported by Jafisah Jaafar

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